Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

—v.—

BRIAN F. WEBER, *et al.*,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

—v.—

BRIAN F. WEBER, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

FRANK J. DONNER

ROBERT Z. LEWIS
SARAH R. WUNSCH
LEONARD D. POLLETTA
11 East 51st Street
New York, New York 10022
Attorneys for Amicus Curiae

TABLE OF CONTENTS

PAGE

Table of Cases and Authorities i

Cases i

Statutes and Rules iii

Other Authorities iii

Interest of *Amicus* 1

The Agreement Between the Steelworkers and Kaiser 3

The Complaint and the Decisions Below 6

ARGUMENT—

The Courts Below Committed Error in Determining That a Voluntary Agreement Between a Collective Bargaining Representative and an Employer to Remedy Historic Social Racial Discrimination Violated Title VII 11

CONCLUSION 21

TABLE OF CASES AND AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 16, 22

Associated General Contractors v. Altshuler, 490 F. 2d 9 (1st Cir. 1973) 14

Brown v. School Board, 347 U.S. 483 (1954) 19

Civil Right Cases, 109 U.S. 3 (1883) 18

Contractors Association v. Secretary of Labor, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971) 14

PAGE

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) .. 16

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 13

Hughes Tool Co., 147 NLRB #16 (1964) 13
Humphrey v. Moore, 375 U.S. 335 (1964) 13

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 19, 21

Katzenbach v. Morgan, 384 U.S. 641 (1966) 21

Local #53 v. Vogler, 507 F. 2d 1047 (5th Cir. 1969) 14

NLRB v. Mansion House Center Mgt. Corp., 473 F. 2d 471 (8th Cir. 1973) 13
NLRB v. J.P. Stevens & Co., Inc., 563 F. 2d 8 (2nd Cir. 1977) 12
NLRB v. Sumter Plywood Corp., 535 F. 2d 917 (5th Cir. 1976) 13

Plessy v. Ferguson, 163 U.S. 537 (1896) 18, 19

Regents of California v. Bakke, —— U.S. ——, 98 S.Ct. 2733 (1978) 20, 21

Southern Illinois Builders Assn. v. Ogilvie, 471 F. 2d 680 (7th Cir. 1972) 14
Steele v. Louisville & N. Rlwy. Co., 323 U.S. 192 (1944) 13

United States v. Allegheny-Ludlum Industries, Inc., No. CA-74-P-0339-5, N.D. Ala. 10
United States v. Allegheny-Ludlum Industries, Inc., 517 F. 2d 826 (5th Cir. 1975) 6
United States v. Elevator Contractors, 538 F. 2d 1012 (3rd Cir. 1976) 14

PAGE

United States v. Wood, Wire and Metal Lathers, 471 F. 2d 408 (2nd Cir. 1973), cert. den. 412 U.S. 939 (1973) 14

Vaca v. Sipes, 386 U.S. 171 (1967) 13

Weber v. Kaiser Aluminum & Chemical Corp., 415 F. Supp. 761 (1976) 7
Weber v. Kaiser Aluminum & Chemical Corp., et al., 563 F. 2d 216 (5th Cir. 1977) 5, 8, 10, 11

Statutes and Rules:

Civil Rights Act of 1964, 42 U.S.C. §2000e 2, 5, 6, 8, 9

EEOC Guidelines on Affirmative Action 22

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401, et seq. 13

National Labor Relations Act, 29 U.S.C. §151, et seq. 2, 12

Presidential Executive Order #11246 ..... 5, 6

United States Constitution, Art. I, §2, 9 16

United States Constitution, Art. I, §2 16

Other Authorities:

DeTocqueville, *Democracy in America,* Part 2, Book 3, Chs. 39, 40, 41 20

Directory of National Unions and Employee Association, 1975, U.S. Dept. of Labor, Bureau of Labor Statistics 12

Johnston, John, "Sex & Property: The Common Law", 47 N. Y. Univ. 1033 20

PAGE

Kinoy, Arthur, "The Constitutional Rights of Negro Freedom", 21 Rutgers L. Rev. 387 (1967) 18

Matles and Higgins, *Them and Us,* Prentice-Hall, Inc., Englewood, N.J. 1974 15

Myrdal, Gunner, *American Dilemma,* App. 5 20

Northrup, Herbert R., *Organized Labor and the Negro,* Harper & Bros. 1944 14

Perlman, Mark, *Democracy in the International Association of Machinists,* John Wiley & Sons, Inc. 1962 .. 15

Quarles, Benjamin, *The Negro in the Making of America,* McMillan (1969) 14

Ross, Arthur, "The Negro in the American Economy" in Ross & Hill (eds.), *Employment, Race and Poverty,* New York, Harcourt Brace & World (1967) 15

Silverman, Charles, *Crisis in Black and White,* Random House, N. Y., 1964 15

Statistical Abstract of the United States, 1977, U.S. Dept. of Commerce, Bureau of the Census Table #914, p. 560 12

Symposium "Women and the Law," 6 Human Rights Law Rev. 107 20

Woodward, C. Van, *Reunion and Reaction,* Boston, Little & Co. (1951) 18

Worthman & Green, "Black Workers in the New South, 1865-1915", in *Key Issues in the Afro-American Experience,* Vol. II, Harcourt, Brace, Javanovich, (1971), Huggins, Kilson & Fox, (eds.) 14

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

—v.—

BRIAN F. WEBER, *et al.,*

Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,

Petitioner,

—v.—

BRIAN F. WEBER,

Respondent.

UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

—v.—

BRIAN F. WEBER, *et al.,*

Respondents.

BRIEF *AMICUS CURIAE* OF THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Interest of *Amicus**

United Electrical, Radio and Machine Workers of America (UE) is a labor organization as defined by the National

* This Brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of this Court.

Labor Relations Act, 29 U.S.C. §152 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(d). It represents thousands of employees of manufacturers of electrical products and equipment, machinery, appliances and products, machine tools and allied products throughout the United States and Canada, including workers of both sexes and of varied national and racial origin.

The Preamble to the UE Constitution, adopted at the time of the Union's foundation in 1936, states:

> "We, the Electrical, Radio and Machine Workers (UE), realize that the struggle to better our working and living conditions is in vain unless we are united to protect ourselves collectively against the organized forces of the employers.
>
> "Realizing that the old craft form of trade union organization is unable to defend effectively the interests and improve the conditions of the wage earners, WE, THE ELECTRICAL, RADIO AND MACHINE WORKERS (UE) form an organization which unites all workers in our industry on an industrial basis, and rank and file control, regardless of craft, age, sex, nationality, race, creed or political beliefs, and pursue at all times a policy of aggressive struggle to improve our conditions."

It accurately defines not only the objectives of the founders of UE and of the Union itself held throughout its existence but, in the course of doing so, the Preamble also accurately defines the discriminatory and exclusionary practices in the trade union movement which UE has repudiated.

The struggle for equality in the workplace, in the Union's internal affairs and in public life in general has been dominant in the history of UE. Equally dominant in UE's

history has been its struggle for the extension and deepening of the unity among all workers in order to effectively confront the united formations of the employers.

It is because UE believes that the reasonable arrangements negotiated between the United Steelworkers and Kaiser Aluminum and Chemical Corporation (Kaiser) under scrutiny here represented an important measure tending to remove an oppressive inequality visited upon minority workers and advancing the unity of all workers in the aluminum industry that UE is concerned with this case. The two lower courts have struck down the agreement. In doing so they have placed a major obstacle in the way of the Steelworkers and other unions to discharge a duty dictated by their founding principles and by their legal obligations to fairly represent all those who have designated them as their bargaining agents.

The Agreement Between the Steelworkers and Kaiser

In 1974 the Steelworkers and Kaiser entered into a national agreement covering represented employees in 15 of th Company's plants throughout the United States. The part of the national collective bargaining contract relevant here provides in essence that apprentice and craft jobs at each of the plants were to be filled at a minimum of not less than one minority employee for each non-minority employee until a particular goal had been reached. The goal was expected to differ at each plant. The goal established at the Gramercy, Louisiana plant was approximately 40% black craft workers, a percentage proportionate to the black working population in the area.

The Gramercy plant, out of which this litigation arises, opened in 1958. At the time of the 1974 agreement the

workforce employed at the Kaiser Gramercy plant was 14.8% black and only five of the 290 skilled workers at the plant were black.

Kaiser explains the small number of black craft workers at Gramercy in terms of "the unavailability of trained, educated and qualified minorities" (App. 98, 100). Prior to the execution of the agreement Kaiser had filled the vacancies in the craft jobs by hiring from the street those already qualified and trained and these were mainly from the building trades industry (App. 68, 98, 100, 112, 133, 196). However, the Employer had provided on-the-job training in the craft jobs so that represented workers in the bargaining units at each of the 15 plants would have access (App. 101-102, 115, 133-134, 196-197). But in order to secure admission into the on-the-job training program the bargaining unit employee was required to have relevant prior experience (App. 110, 196-197). Thus, the carpenter-painter training program in 1964 was limited to those with a minimum of one year of experience (App. 196) and the training program for the job of general repairman required at least three years of experience, although in 1971 the requirement was reduced by one year (App. 197). The requirement of previous experience eliminated most of the bargaining unit employees from entering into training programs (App. 64, 82, 90, 104-105, 115).

The impact of the pre-1974 arrangements was felt particularly by black workers because the percentage of black workers who had acquired relevant past experience in the crafts before coming to work for Kaiser in the bargaining unit was much lower than the percentage of whites who had acquired such experience due to their historic exclusion from the craft jobs. Of the 28 workers admitted to the Company's pre-1974 craft job training programs, only

two were minority employees (App. 74, 91-92, 110, 135, 146, 162-163, 196-197).

Following the signing of the 1974 agreement as vacancies in the training program arose the Employer filled them on a one for one basis from its existing workforce. For every two vacancies the most senior black bidder and the most senior white bidder were selected and at the time of the trial of this case 7 black and 6 white workers have been selected for the craft job training vacancies (App. 198). All of the black employees selected under the 1974 agreement at Gramercy had been hired as production workers before the Company abolished the "prior experience" requirement and were junior to white workers who had not been selected.

The reasons for which the Steelworkers and Kaiser entered into this agreement are significant. First, a principled interest in eradicating historic discrimination in employment against black workers is of course to be assumed. But there were additional reasons for this contract provision. As put by Judge Wisdom, *Weber* v. *Kaiser Aluminum and Chemical Corporation et al.*, 563 F.2d 216 (5th Cir. 1977) at 228-9:

> Both sides were under pressure in 1974. The company feared federal action through the Office of Federal Contracts Compliance, the agency charged with enforcing Executive Order 11246. Both Kaiser and the Union feared private Title VII actions, by blacks on the basis of crafts employment. The contractual provision set out by the majority resulted. It was incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major

American aluminum producers, Reynolds Metals and ALCOA.

A similar provision was also contained in the national steel producers settlement, approved by this Court in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5 Cir. 1975). The government had investigated racial discrimination by the country's nine major steel producers. The government, the producers, and this same union conducted intensive negotiations. After six months of negotiations, the government filed a pattern and practice suit against the Union and the nine producers.

Thus, a combination of principle and pragmatism occasioned the new agreement. The compulsions of the law performed the vital and valuable function of assisting the struggle for principle. It is clear that the 1974 agreement providing a way in which the unskilled workers of the various production units at the Kaiser plants could gain access to craft jobs and the training therefor would not have been entered into without the presence of Title VII of the Civil Rights Act of 1964 or Executive Order No. 11246, and neither the minority nor majority workers at any of the plants would have acquired this benefit.

The Complaint and the Decisions Below

Weber, a white worker employed at the Gramercy plant, filed the complaint which initiated this litigation, claiming that the Steelworkers and Kaiser had violated his Title VII rights because he had been an unsuccessful bidder for entry in the craft job training program at the Gramercy plant in competition with black bidders with less seniority. He contended that he had been denied rights his seniority entitled him to solely on account of his race. He sued on

behalf of a class embracing Gramercy employees who were members of the Steelworkers Local, who were not members of a minority group and who had applied for or were eligible to apply for on-the-job training programs since the date the national agreement had become effective.

The District Court upheld the complaint and permanently enjoined further application at Gramercy of the 1974 national agreement establishing the training program and defining the qualifications for admission to the skilled crafts.

The District Court decided that prior to 1974 Kaiser itself had not discriminated against minority workers in filling the craft training positions, that, therefore, the contractual provision requiring admission to the skilled crafts and the training program by unskilled workers in the production unit at Gramercy did not amount to a remedy for past employer discrimination and therefore constituted racial discrimination in itself. The trial court said, in *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761 at 769:

> Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers

in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

A divided Court of Appeals for the 5th Circuit affirmed *Weber* v. *Kaiser and Chemical Corp.*, 563 F. 2d 216. The court noted that Section 703(j) of Title VII did not require preferential treatment of any minority. It concluded that preferential treatment was also strictly forbidden in response to societal discrimination unless such preferential treatment was embarked upon to restore employees to their rightful place within a particular employment scheme (at pp. 219, 225).

The majority said, at p. 225:

> [6] Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training blamed on past *societal discrimination.* For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them to the Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII.

The majority affirmed the district court's opinion ". . . on the second ground that under the circumstances of this case the hiring ratio could not be approved even had it been judicially imposed" (at 224). The trial court's formulation of the "second ground" referred to in the appellate decision is (at 223):

> "Courts would not mandate a preferential quota system under these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer."

Thus, the two lower courts have held that "societal" discrimination cannot be remedied by a voluntary agreement such as the one negotiated by Kaiser Aluminum and the Steelworkers or by a judicial order. No voluntary affirmative action agreement by a union and an employer will be appropriate under Title VII unless the parties to it can say with assurance that a court would order the same arrangements.

Effectively, these decisions put an end to such voluntary agreements. First, no trade union—or employer—can enter into a contract such as that negotiated between Kaiser and the Steelworkers because there is no way in which they can predict with precision how a court would find.

> Divining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact-sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen separate legal opinions would be required because, under the majority's approach, each plant will be judged on

its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult. *Weber* v. *Kaiser Aluminum,* 563 F. 2d at 230 (dissent of Wisdom, C.J.).

Secondly, any union and/or employer will be deterred from voluntarily complying with the mandate of Title VII because, given the position advanced by the two lower courts, they would have to run unacceptable risks.

> The majority's standard produces indirectly what the district court's first ground established directly—an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *Weber* v. *Kaiser Aluminum,* 563 F. 2d at 230 (dissent of Wisdom, C.J.).*

* The freezing effect of the decisions in *Weber* v. *Kaiser Aluminum, et al., supra,* is exemplified by the action of the consent decree court in *United States* v. *Allegheny Ludlum Industries, Inc.*, No. CA74-P-0339-5 (N.D. Ala.), which has issued an order to show cause why changes in that decree are not required since its essence was a collective bargaining agreement between the union and the companies without examination by the court of the circumstances in each of the 250 affected plants. (See Petition for Certiorari, case No. 78-492, filed by the United Steelworkers of America, a defendant below.

ARGUMENT

The Courts Below Committed Error in Determining That a Voluntary Agreement Between a Collective Bargaining Representative and an Employer to Remedy Historic Social Racial Discrimination Violated Title VII.

The only issue to which *amicus* UE addresses itself is whether the courts below committed error in determining that Title VII had been violated by the agreement between the Steelworkers and Kaiser to remedy historic societal racial discrimination, as it affected the workers at a particular plant, which has virtually barred minorities from entering into the skilled crafts.* UE respectfully contends that error has been committed.

First, these decisions place a block in the path of any labor organization which seeks to organize workers in a way which unites them on an industrial basis, with rank-and-file control, and regardless of craft, age, sex, nationality, race, creed or political beliefs (*supra,* at p. 2). These principles of organization must be followed if effective rank-and-file democratic unions are to emerge in this country. Women and minority workers need to know that the union they form has the capacity to combine all workers in a manner capable of confronting employers who themselves are well organized. Ignoring the specific historic societal discrimination experienced by women and minorities in this country, especially in the arena in which labor unions function—on the job—weakens, from its inception, effective combinations of workers seeking to improve their working conditions and wages.

* UE is aware that a powerful argument has been advanced to the effect that the record in this case shows an arguable violation of Title VII by the employer. *Weber* v. *Kaiser Aluminum,* 563 F. 2d, at 230-232 (dissenting opinion of Wisdom, C.J.). This brief does not address that question.

The contract negotiated between Kaiser and the Steelworkers was a useful effort to remove historic societal barriers to the entry of minorities into the skilled craft jobs at the Gramercy plant of Kaiser in a unifying rather than divisive manner. The entry of unskilled white workers into the crafts also was a part of the agreement. The task facing democratic unions which seek to organize workers without invidious discrimination is made difficult enough by the employers. They would be grateful if the courts would refrain from interfering with this legitimate process. The decisions of the courts below constitute such interference.

The reasons which have made it necessary historically for workers to combine into democratic, non-discriminatory labor organizations are as valid today as they ever were. Only 22% of the total work force of this country is organized into trade unions.* This is true at a time when corporate control and economic power has become more and more centralized.** The melancholy experience of the federal courts with J.P. Stevens, Inc. is but the most obvious manifestation of employer resistance to the organization of their workers. *NLRB* v. *J.P. Stevens & Co., Inc.*, 563 F. 2d 8 (2nd Cir. 1977), at pp. 13, 15 and footnotes 1, 2, at p. 13.

While Congress may not look at the question of the organization of workers in the same light as does UE, nevertheless, it has asserted a national policy recognizing the right of employees to organize unions of their own choice. *National Labor Relations Act*, as amended, 29 U.S.C., §151 *et seq.* "Our national labor policy views union

* *Directory of National Unions and Employee Associations, 1975* U.S. Dep't of Labor, Bureau of Labor Statistics.

** *Statistical Abstract of the United States, 1977* U.S. Dep't of Commerce, Bureau of the Census, Table #914 page 560.

membership as a necessary good to most all of working [people]." *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471, 473 (8th Cir. 1973). National policy further requires that labor organizations be democratic (*Labor-Management Reporting and Disclosure Act of 1959*, 29 U.S.C., §401 *et seq.*). Moreover, the courts have held that the privileges which federal law grants to a union as a representative of workers carry with them the duty to represent in good faith the interests of all workers. *Steele* v. *Louisville and N. Rway Co.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The latter case notes that in fact ". . . the statutory duty of fair representation was developed . . . in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives . . ." *Vaca* v. *Sipes, supra*, p. 177. A union which discriminates on the basis of race has failed to carry out its duty of fair representation and the National Labor Relations Board on constitutional grounds is barred from certifying such a union as a bargaining representative. *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973); *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (5th Cir. 1976); *Hughes Tool Co.*, 147 NLRB #16, 1964.

Thus, both the interests of employees themselves in the organizing process and national policy as asserted by Congress and the courts require that a union be responsive and sensitive to the special concerns of the minority and women workers it seeks to represent.

Second, the methods employed by Kaiser for admitting workers to the craft jobs at Gramercy prior to the 1974 agreement effectively resulted in the exclusion of black workers since their entry into the craft jobs had been in-

vidiously restricted for a very considerable historic period. It is not debatable, in fact, that black workers have indeed been systematically and deliberately denied access to the skilled trades.

The courts below did not challenge this basic fact even though they knew that a fundamental reason for the 1974 agreement between the Company and the Union was precisely this historic societal discrimination. The data permits no other conclusion.* The number of judicial findings of discrimination in the craft jobs demonstrate that the past is present. *United States* v. *Elevator Contractors,* 538 F. 2d 1012 (3rd Cir. 1976); *Associated General Contractors* v. *Altshuler,* 490 F. 2d 9 (1st Cir. 1973), cert. den. 416 U.S. 957 (1974); *U.S.* v. *Wood Wire and Metal Lathers,* 471 F. 2d 408 (2d Cir. 1973), cert. den. 412 U.S. 939 (1973); *So. Illinois Builders Association* v. *Ogilvie,* 471 F. 2d 680 (7th Cir. 1972); *Contractors Association* v. *Secretary of Labor,* 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971); *Local 53* v. *Vogler,* 507 F. 2d 1047 (5th Cir. 1969).

By the end of the Civil War 83% of the skilled artisans in the South (5 out of 6) were black but by 1900 the black artisans constituted about 5% of the total.**

White artisans, in good part by way of the development of craft unionism and the apprentice system, and in part by way of violence and intimidation, pushed black workers

* See Herbert R. Northrup, *Organized Labor and the Negro,* Harper & Bros. 1944, Tables Ia and Ib, pp. 18, 19.

** Quarles, Benjamin, *The Negro in the Making of America.* New York, Macmillan, 1969; Worthman, Paul B., & James R. Green, "Black Workers in the New South, 1865-1915", in Nathan I. Huggins, Martin Kilson, & Daniel M. Fox (eds.), *Key Issues in the Afro-American Experience, Vol. II,* New York, Harcourt, Brace, Jovanovich, 1971.

out of the skilled trades.* This exclusionary process was conducted both in the North and the South. Before the Civil War opposition to black workers performing the skilled trades was controlled by the slave owners but the pressures to keep blacks out in the North were far more successful. Following the Civil War the exclusionary drive was equally virulent in the North and the South.**

It is obvious that the exclusion of black workers from the skilled crafts was general and did not depend upon identifying specific victims. Nor should the elimination of this misconduct depend upon the identification of specific victims.

The mechanisms for the removal and exclusion of black workers from the skilled trades were many and varied. Some unions by specific provision in their constitutions or rituals limited membership to "white Caucasians". These mechanisms have continued in operation or effect, and the racial composition of the skilled trades today is the result.***

THIRD, the historic exclusion of blacks from the skilled trades is, of course, of particular significance in this case. However, it is but one aspect of the treatment of blacks in this country following what has been called ". . . an unfortunate and ignominious page in this country's his-

* Ross, Arthur M. "The Negro in the American Economy", in Arthur M. Ross & Herbert Hill (eds.), *Employment, Race and Poverty.* New York: Harcourt, Brace & World, 1967.

** E.g. Charles Silverman, *Crisis in Black and White.* Random House, New York, 1964, p. 104.

*** Perlman, Mark, *Democracy in the International Association of Machinists.* John Wiley & Sons, Inc. 1962, pp. 14, 15, 39, 44-46. It should be observed that resistance to the "white Caucasian" ritual existed from the early days of IAM history and was manifest from time to time until its repeal in 1947. Pearlman, *supra,* pp. 15, 39; James J. Matles and James Higgins, *Them and Us.* Prentice-Hall, Inc. 1974, pp. 46-47.

tory". *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), at p. 418.

What is unique about what happened to blacks in this country is that it was the product of national policy and woven into the United States Constitution itself.

Unlike other minorities who came to this country, blacks arrived as chattel slaves uprooted from their own lands, forced into labor and deprived of all legal rights. When the Declaration of Independence was agreed upon by the Founders who declared that it was self-evident that all men are created equal and are endowed with certain unalienable rights including those to life, liberty and the pursuit of happiness, they did not have blacks, women or native Indian people in mind. The United States Constitution explicitly recognized slavery of black people when it provided (a) that a slave was equivalent to three-fifths of a person in connection with the apportionment of Congressional representatives and taxation among the states; (b) limitations on the slave trade; and (c) a fugitive slave clause. Art. I §§2, 9, Art. IV §2.

The various states also enacted measures protecting slavery. Nor was the segregation of blacks confined to the Southern states where the overt forms of slavery were paramount. Northern communities segregated the blacks in numerous ways.

In *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1856) this Court declared that the Constitution held slaves to be property and that "the right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to

---

* Minorities and women have also been excluded from the craft trades. The Kaiser-Steelworkers agreement speaks of minorities. At the Gramercy plant the affected class consisted of black employees. It is not clear from the record what minorities would have been involved at the 14 other Kaiser plants.

the citizens of the United States . . ." (at 451). This Court further said that blacks were not intended to be included as citizens under the Constitution because they were "regarded as being of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . ." (at 407). In rationalizing this conclusion the Court referred to the multitude of segregationist arrangements in the Northern communities such as Boston which demonstrated, according to the Court, the general attitude that blacks were inferior albeit in a setting in which slavery did not exist.

The national policy recognizing and protecting slavery and the rationale for doing so grounded on the claim of racial inferiority was renounced, cancelled and annulled as a consequence of a gigantic social upheavel, the Civil War, and post-war Civil Rights Amendments then passed. These Amendments and the Congressional enactments designed to effectuate them can be regarded as early affirmative actions taken in this country to redress the repudiated slavery policies of the past. The Reconstruction measures, including the establishment of the Freedmen's Bureau and the arrangements whereby blacks could secure land and find the economic basis for surviving, all were affirmative actions designed to give meaning to the otherwise paper freedom provided by the Amendments and the statutes. To eliminate slavery as the condition of life of blacks it was necessary, from the moment the Civil Rights Amendments were passed, to systematically carry on the process of eliminating the badges and indicia of slavery, i.e., every form of racially based segregation and discrimination.

It is painful to assert that this Court played a central part in not only blocking these efforts but in actually as-

sisting the reimposition of bondage in new forms. *Civil Rights Cases,* 109 U.S. 3 (1883). The Supreme Court's decision placed a judicial *imprimatur* upon the political compromise of 1877 whereby the leading financial and political forces in the country reached agreements which resulted in the designation of a President, fundamental, economic and political arrangements for the future control of the country, and the turning over of control of the blacks to the white supremacists of the Southern states.* The Court's decision in the *Civil Rights Cases* annulled Congressional civil rights statutes which gave practical expression to the national policy which affirmatively recognized that blacks were human beings and were entitled to all the rights of citizens, and were needful of specific affirmative actions designed to overcome the badges and indicia of nationally sanctioned slavery including equal access to public places. The majority of the Court said that the guaranteeing of the right of citizenship to the blacks was primarily a matter for the states. The federal government had no role except to correct any actions by the states which infringed upon the citizenship rights of blacks. Private infringements were not within the federal cognizance. Thus, of particular interest in this case, black artisans were thereupon denied legal protection against exclusion from their crafts with consequences which are now apparent in Gramercy, Louisiana (*supra,* pp. 4, 14-15).

Thirteen years later this Court gave full recognition to segregation. *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). In doing so it misunderstood historical realities as it also had done in the *Civil Rights Cases.* The majority in each of the two cases assumed that black people were socially,

* C. Van Woodward, *Reunion and Reaction,* Boston, Little & Co. (1951); Arthur Kinoy, the *Constitutional Rights of Negro Freedom,* 21 Rutgers L. Rev. 387 (1967).

economically and politically equal with all others. In *Plessy* the Court said, at 551 (16 S.Ct. at 1143):

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

Justice Harlan, dissenter also in the *Civil Rights Cases,* saw more clearly and pointed out in *Plessy* that the real meaning of the Louisiana law which required railroads to maintain "separate but equal" facilities for blacks and whites (and the construction placed upon it by the Court) was that black people were so inferior and degraded that they could not be permitted to sit in the same cars as white. In short, the badges and indicia of slavery as well as its underlying justification as asserted in *Dred Scott* were being restored judicially with these decisions.

More recently it became possible to suppose that, with a half century of history, the Supreme Court has begun to see the reality of race relations in the United States more clearly. *Brown* v. *School Board,* 347 U.S. 483 (1954); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). The decision in this case may indicate whether the Supreme Court, in the last quarter of the 20th Century, will insist on following the line taken in the last quarter of the 19th by the *Civil Rights Cases* tribunal on the basis of historical misunderstanding or will at last affirm federal responsibility for finally eliminating all vestiges of slavery in this country.*

* Women constitute another group who have faced legal institutional discrimination. That is, the disadvantages to which

FOURTH. There is a direct causal connection between the abandonment of the national commitment to eradicate all of the vestiges of slavery and the present position of black people in this country. This Court, of course, knows of what that position is and most recently has been advised of it by Mr. Justice Marshall in his opinion in *Regents* v. *Bakke,* —— U.S. ——, 98 S.Ct. 2733 (1978) at 2802:

> A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.
>
> When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male

they have been subjected were not simply attitudinal. *DeTocqueville, Democracy in America, Part 2,* Book 3, Chapters 39, 40, 41; Gunner Myrdal, *American Dilemma,* Appendix 5; Johnston, John D. "Sex and Property! The Common Law" etc. 47 New York Univ. L. Rev. 1033; "Symposium: Women and the Law" 6 Human Rights L. Rev. 107. It has been suggested that the federal government also has a special responsibility toward the eradication of all forms of discrimination which have disadvantaged women because there has been a national policy and practice which has protected this discrimination.

> who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

FIFTH. If it is true that the Equal Protection Clause was "virtually strangled in its infancy by post-Civil-War judicial reactionism", *The Regents* v. *Bakke, supra* (opinion of Justice Powell, at 2749), it does not follow that this Court is bound to continue the suffocation. The malady—race discrimination as a vestige of slavery—remains. Moreover, this Court has left open a review of Congressional legislation grounded on §2 of the 13th Amendment and §5 of the 14th Amendment. *Regents* v. *Bakke, supra,* at p. 2755, fn. 41; *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

We are aware that other *amici* briefs will argue the 13th Amendment grounding for finding the Kaiser-Steelworkers agreement to be in keeping with the mandate of Title VII. We commend the Court's attention to that discussion.*

CONCLUSION

Prior to the execution of the 1974 Agreement unskilled production workers at Kaiser's Gramercy plant were effectively excluded from entry into the skilled trades jobs. Black workers in particular were excluded because of the historic bar to their admission into those jobs. It was the particular responsibility of the Steelworkers to attempt to penetrate the barriers. The pressures generated by the Labor Department's Office of Contract Compliance, operat-

* See the brief *amici curiae* of the Affirmative Action Coordinating Center, et al.

ing pursuant to Presidential Executive Orders, and the possibility of litigation under Title VII was of aid to the union and made the solution embodied in the 1974 contract possible. As this Court said in *Albemarle Paper Co.* v. *Moody, supra*, at 417-418: "It is the reasonably certain prospect of a back pay award that provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Voluntary action to remedy past discrimination is the object of Title VII. *EEOC Guidelines on Affirmative Action*, Jan. 11, 1979.

The specific exclusion of black workers from the skilled trades was accomplished in great measure by the acts and rules of admission of the craft trade unions. The Supreme Court's destruction of the statutory protections devised by Congress to prevent precisely what happened with respect to the skilled trades and in a broad spectrum of social, political and economic areas resulted in a segregated society in which the black people of the country were forced into positions of inferiority and deprivation solely on account of their race. And all this was done despite the mandate of the post-Civil War amendments which had committed the nation to a rejection of the notions of racial superiority which provided the rationale for slavery.

History, looked upon as reality and not simply fable agreed upon, required a different reaction by this Court from that found in the *Civil Rights Cases* and *Plessy* v. *Ferguson*. The consequences of the political and judicial decisions taken in the last quarter of the 19th Century are obvious today. The continued exclusion of black workers from the skilled crafts is but one of them.

To hold that Title VII prohibits an arrangement which affirmatively provides for the admission of minority workers into the skilled trades—along with unskilled white workers—once again is an announcement that there is no federal responsibility for eliminating racial discrimination, the vestige of slavery which continue to besmirch our society.

Respectfully submitted,

ROBERT Z. LEWIS
SARAH R. WUNSCH
LEONARD D. POLLETTA
11 East 51st Street
New York, New York 10022

Attorneys for Amicus Curiae